

In the Matter of Marvin Johnson, Ancora Psychiatric Hospital
DOP Docket No. 2005-1113
(Merit System Board, decided January 11, 2006)

The appeal of Marvin Johnson, a Human Services Assistant with the Ancora Psychiatric Hospital, of his removal effective March 1, 2004, on charges, was heard by Chief Administrative Law Judge (ALJ) Laura Sanders, who rendered her initial decision on August 29, 2005. Exceptions were filed on behalf of the appointing authority and exceptions and cross exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL), and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on January 11, 2006, accepted and adopted the Findings of Fact and Conclusions as contained in the attached initial decision but did not adopt the ALJ's recommendation to modify the removal to an oral warning. Rather, the Board modified the removal to a 30-day suspension. Additionally, the Board ordered that the appellant undergo further training on primary restraint techniques (PRT).

DISCUSSION

The appellant was removed from his position as a Human Services Assistant effective March 1, 2004 on the charges of physical abuse of a patient and falsification. Specifically, it was asserted that the appellant deliberately threw a patient to the floor and made a false statement that the patient was bleeding as a result of an earlier incident when the patient banged her head on a bathroom wall. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as a contested case.

In her initial decision, the ALJ found that the patient, to whom the appellant was assigned to watch "one-on-one," entered a restroom across from the nurses' station while appellant waited outside where he could see the patient's head and shoulders in an overhead mirror. After briefly leaving the area to check on a patient dispute, the appellant noticed that the patient's feet were now "pointed toward the wall" in the restroom. Thus, he requested a female Human Services Assistant, Danielle Leslie, to enter the bathroom to check on the patient. Leslie found the patient banging her head on the wall. Leslie testified that after getting the patient to stop injuring herself, the patient became hostile and she noticed that the patient had a "red mark" on her forehead. After persuading the patient to return to the hallway, Leslie

and appellant attempted to reason with the patient and the appellant wanted her to move to the dayroom, but the patient refused. Leslie indicated that the appellant was grabbing the patient's elbow and the patient was pulling away. The ALJ noted that there was disagreement about what exactly happened at this point, but the appellant and patient fell to the floor. When the appellant turned the patient over, her chin was bleeding.

With respect to the fall, Leslie testified "It was real quick; he (appellant) just took her down" and the patient hit her head with "a sound like a gunshot." Leslie noted that when the patient rolled over, she had a cut on her chin that was bleeding. She also stated that the incident was "really unexpected" and that she did not "think he meant to drop her like he did." However, Leslie indicated that she did not believe the patient's conduct warranted restraint and that the appellant could have let the patient stand in the hallway through the remainder of the shift.

Victoria Medley, a Human Services Assistant, was writing notes at the nurses' station when the incident began. Medley indicated that she heard the discussion about the dayroom and saw the appellant pulling on the patient. She testified that the patient was not loud, was not screaming, and could have been allowed to stay in the hallway. Medley described that the patient was pulling away from the appellant when "all of a sudden, he just slammed her down on the ground. I heard her face hit the floor."

The appellant testified that on the morning in question, the patient advised him that she was "feeling closed in" and asked to go outside to smoke a cigarette. Although he initially indicated that he would, the appellant was reminded by a co-worker that patients could only go outside at specified times and he advised the patient that he could not bring her outside for a cigarette. The appellant indicated that the patient got upset, kicked a chair, and asked to go to the bathroom. After Leslie got the patient out of the bathroom, the appellant testified that the patient had "like a scrape" on her forehead" and described it as "little dots of blood." The appellant stated that the patient was "cussing and ranting and raving" because she wanted to go outside, but nobody would take her. As the patient was walking toward the outside, the appellant went to put his arms around her shoulders, whereupon the patient stated "Get your f... hands off me." The appellant stated that Leslie, who was pregnant at the time, went up to the patient, took her arm, and pointed, telling her to go to the dayroom, and the patient lunged at Leslie. At this point, the appellant testified that he attempted to place the patient in a PRT to calm her down, but before his hands fully clasped correctly, the patient locked her left leg over his, bounced her weight off the nurses' station wall, and twisted, resulting in the appellant and patient falling face down onto the

floor. When the appellant turned the patient over onto her back, he saw a “bubble of blood” on her chin.

In a statement filed that day, the appellant reported that:

Pt went to bathroom; pt started to pound head in bathroom stall; female staff went in bath (sic) got pt to come out pt was bleeding when she came out. [P]t started fighting staff. [P]t was taken down by staff. [P]t was taken to observation room.

The appellant indicated that Sheree Fitzgerald, Section Chief, called him at home after the incident and gave him the opportunity to amend his statement about the incident and he indicated that he would write one when he got into work that night. However, the appellant indicated that Fitzgerald advised him that since he could not come in immediately, she would use his previously filed statement.

The ALJ reviewed a videotape of the incident and noted that the videotape is not continuous, but a series of snapshots placed about a second apart. The ALJ noted that videotape was “rather dark and shadowy, and sometimes too far away for clear vision.” Nevertheless, the ALJ determined that the tape did demonstrate that the incident occurred very rapidly and that Leslie, who was standing a little bit to the side at the time of the incident, probably did not have a clear picture as to what happened. Moreover, the ALJ emphasized that Leslie testified that the appellant might have fallen and Medley only heard the discussion and saw the aftermath, but was too far away for a clear view. As such, the ALJ found that since the videotape showed the patient moving in the direction of Leslie, the appellant believed that the patient was about to engage in an attack on a pregnant colleague. Further, the ALJ determined that the videotape demonstrated that the appellant’s arms were in a position consistent with a “PRT Solo Take Down” as per the training manual. Thus, the ALJ found that appellant was attempting to put the patient in a PRT. As such, the ALJ determined that the fall was an accident and that the appointing authority failed to meet its burden of proof to establish that the appellant abused a patient. However, based on Leslie’s testimony and the fact that she was in the best position to view the patient’s mark on her head, the ALJ determined that the patient was not bleeding when she emerged from the bathroom and that the appellant deliberately falsified that portion of the record. As such, the ALJ recommended the charge for falsification be upheld. Based on his spotless disciplinary record, the ALJ reduced the removal to an oral warning.

In its exceptions to the ALJ’s initial decision, the appointing authority contends that the ALJ’s recommendation to dismiss the removal for physical

abuse is based entirely on an unsupported supposition that the appellant accidentally caused the patient's injuries. It argues that the definition of physical abuse does not require the element of intent to cause the injury. Rather, consistent with Department of Human Services Handbook, Administrative Order 4:08, physical abuse is a physical act directed at a client, patient or resident of a type that could tend to cause pain, injury, anguish and/or suffering. Additionally, the appointing authority argues that the appellant's insistence that the patient go to the dayroom escalated the patient's agitation when there was no reason that she could not have been left in the hallway. Further, the appointing authority underscores that it was only at the hearing that the appellant made reference to the patient acting aggressively toward Leslie, that Leslie stepped in to physically assist in the matter several times, and that she did not testify that she had any type of fear for her safety. Moreover, Leslie testified that the patient's behavior did not warrant any type of restraint. The appointing authority also argues that notwithstanding the quality of the videotape, the videotape in itself is not dispositive that abuse did not occur. With respect to the falsification charge, the appointing authority argues that when an act concerns the medical condition of a psychiatric patient, falsification cannot be tolerated and an employee who does so must be removed.

In response, the appellant maintains that the ALJ rendered the correct decision with respect to the charge of patient abuse. Specifically, the appellant presents that the ALJ was not only guided by the witnesses' testimony, but also other evidence, such as her review of the videotape. Indeed, the appellant argues that the ALJ review of the videotape supported his testimony that he acted appropriately for the protection of another staff member and that any injury suffered by the patient was a result of the accidental fall. Further, the appellant states that he understood that the penalty for patient abuse is removal, but that charge does not contemplate a patient's injury as a result of an accident. Additionally, the appellant underscores that the ALJ found that the witnesses were unable to clearly observe his actions while the videotape supported his explanation as to how he and the patient fell to the floor. Thus, the appellant maintains that an accidental injury does not necessarily give rise to abuse. The appellant takes exception with the finding of falsification as to the records. Specifically, the appellant states that Leslie testified that she observed a red mark and that he reported bleeding. The appellant presents that it is possible that Leslie observed redness while he observed bleeding, particularly since it was reported that the patient was banging her head on the wall. Thus, while motivation to exaggerate the injury observed may exist, this situation is simply a difference in the observations between Leslie and appellant. Thus, the appellant maintains that the ALJ's decision should be modified and both the charges of patient abuse and falsification dismissed.

Upon an independent review of the record, including a review of the videotape, the Board agrees with the findings of the ALJ and concludes that the appointing authority has not met its burden of proof in this matter and dismisses the charge of patient abuse. In this regard, the ALJ relied heavily on both the testimony of the witnesses and what she could glean from the videotape in order to make her determination that this was an unfortunate accident. Essentially, since the videotape was not conclusive in the eyes of the ALJ, she recommended that the charges be dismissed. Accordingly, the Board's assessment of this matter must start with its own review of the incident involving the appellant and what was captured on the videotape.

During an executive session of the Board's meeting on January 11, 2006, 2005, the Board members reviewed the videotape of the incident involving the appellant several times. After its review of the testimony of the witnesses and the videotape, the Board upholds the ALJ's finding that the appellant believed the patient was about to engage in an attack on a pregnant colleague and that the fall was an accident. The Board determined that the tape was unclear and did not find that the tape demonstrated sufficient evidence to overturn the ALJ's factual findings that the appellant did not engage in patient abuse.

With regard to the patient abuse charge, the Board finds the appointing authority's exceptions unpersuasive. Initially, the Board acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Board appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Board has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). Nevertheless, upon a thorough review of the record, including the testimony and evidence presented at the hearing, the Board finds that the ALJ's determinations in this respect are proper, and that the credible evidence in the record supports the ALJ's conclusion that the appointing authority did not meet its burden of proof with regard to the charge of physical abuse of a patient. With regard to

the standard for overturning an ALJ's credibility determination, *N.J.S.A.* 52:14B-10(c) provides, in part, that:

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

See also N.J.A.C. 1:1-18.6(c); *Cavalieri v. Public Employees Retirement System, supra*. The Board finds that in this case, this strict standard has not been met.

However, the Board finds that the appointing authority's exceptions with respect to the charge of falsification are persuasive. In an institutional setting where psychiatric patients are being treated, it is imperative for all employees to give a full and accurate account of incidents that occur, especially where a patient is injured. In this regard, the Board notes that the appellant was obliged to give a full and accurate account of the incident and he did not.

In determining the proper penalty, the Board's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Board also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. The ALJ determined that an oral warning was an appropriate penalty. However, an oral warning is not even considered a disciplinary action. In this case it is clear that a severe penalty is warranted in situations where a charge of falsification involving an injured patient is sustained. An individual in the appellant's position is entrusted with the care of psychiatric patients and accurate and complete reporting is essential. Such inappropriate behavior with respect to record keeping cannot be tolerated and is worthy of severe sanction. Therefore, based on the appellant's lack of discipline since his employment in November 2001, the Board finds that a 30-day suspension is an appropriate penalty. Additionally, given the appellant's apparent difficulty in executing a PRT coupled with the Board's concern for patient safety, the appellant is also ordered to undergo further PRT training.

Since the penalty has been reduced, the appellant is entitled to mitigated back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. *N.J.A.C.* 4A:2-2.12(a) provides for the award of reasonable counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div., March 18, 2004); *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Board dismissed the charge relating to physical abuse of a patient. Nevertheless, the Board has sustained the charge of falsification and imposed major discipline, *i.e.*, a 30-day suspension. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. See *In the Matter of Bazyt Bergus* (MSB, decided December 19, 2000), *aff'd*, *Bazyt Bergus v. City of Newark*, Docket No. A-3382-00T5 (App. Div. June 3, 2002); *In the Matter of Mario Simmons* (MSB, decided October 26, 1999). It is also noted that a reduction in penalty may lead to an award of partial counsel fees, but only under circumstances where an appellant has prevailed on the most serious charge or charges of a series leaving only incidental charges, which give rise to a significantly reduced penalty, such as a minor discipline. See *Thomas Grill and James Walsh v. City of Newark*, Docket No. A-6224-98T3 (App. Div., January 30, 2001); *In the Matter of Diane Murphy* (MSB, decided June 8, 1999); *In the Matter of Joanne Chase* (MSB, decided June 24, 1997); *In the Matter of James Haldeman* (MSB, decided September 7, 1994); *In the Matter of Donald Fritze* (MSB, decided January 26, 1993). Such is not the situation in this case. In this regard, since the sustained charge against the appellant is serious in nature and the Board imposed major discipline, he is not entitled to partial counsel fees. For example, in *In the Matter of Kathleen Rhoads* (MSB, decided September 10, 2002), the appellant was removed on charges of insubordination, inability to perform duties, conduct unbecoming a public employee and neglect of duty. The Board upheld the charge of neglect of duty and modified the penalty to a 15-day suspension. The Board denied any award of counsel fees, since the sustained charge against the appellant was serious in nature and major discipline was imposed.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Board's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim,

as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Board finds that the appointing authority's action in removing the appellant was not justified. Therefore, the Board reverses that action and modifies the removal to a 30-day suspension. The Board further orders that the appellant be granted back pay, benefits and seniority for the period following his 30-day suspension to the date of his actual reinstatement. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by the appellant during this period. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Further, the Board denies counsel fees pursuant to *N.J.A.C. 4A:2-2.12*.

The parties must inform the Board, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Board will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.